Public Prosecutor v Kandiah a/l Subramaniam

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–53 OF 2006
SYED AHMAD HELMY J
26 SEPTEMBER 2008

Criminal Law — Firearms Act — Whether accused had discharged firearm with intention to cause death or hurt — Whether there was failure to prove essential ingredient of charge — Whether accused cast beyond reasonable doubt on prosecution's case — Firearms (Licensed Penalties) Act 1971 s 3

When the accused, Kandiah a/l Subramaniam, was apprehended by the police he allegedly resisted arrest by a police officer, Khairul Anuar b Sarbini ('the arresting officer'). Further, in the course of resisting arrest the accused had gained control of the arresting officer's pistol ('the pistol') and discharged two shots from it. Thereafter the accused had escaped from the scene of the crime but surrendered himself to the police six days later. After his arrest the accused had co-operated with the police and assisted them in the recovery of the pistol from the bushes where he threw it when he made his getaway. The accused was charged for an offence under s 3 of the Firearms (Licensed Penalties) Act 1971. The prosecution in support of the charge called eight witnesses to testify. At the close of the prosecution case the accused submitted that the prosecution had failed to make out a prima facie case, in that, inter alia, there was a discrepancy in the arresting officer's oral testimony and his police report, there was an absence of fingerprints on the pistol, there was an inconsistency in the number of police personnel involved in the raid when the accused was apprehended, and there was a failure of the police to satisfactorily account for the safekeeping of the pistol from the time of its discovery. Despite these submissions, the trial judge was satisfied that the prosecution had proven a prima facie case against the accused. When the accused was called to enter his defence he elected to give evidence on oath. According to the accused he had, on the day in question, rented his lorry to a customer who had wanted to move office. After the lorry had been loaded with computers and other goods, the accused was directed to drive away. Whilst the lorry was about to move the accused saw policemen on two motorcycles approaching the lorry and it was only then that the accused suspected that there was something wrong. However, he drove the lorry with the arresting officer in hot pursuit until he came to a dead end. The accused then alighted from the lorry and saw the arresting officer pointing the pistol at him. According to the accused he wrested with the arresting officer for the

pistol because he feared that he would be shot otherwise and in the course of the ensuing struggle the pistol was discharged twice, while it was still in the possession of the arresting officer. In essence the accused's defence was that the discharge of the two shots was made by the arresting officer and the reason behind his seizure of the pistol was to save himself. The defence contended that upon evaluating the totality of the evidence adduced there were three versions of how the two shots were discharged. The arresting officer had orally testified that the accused had fired the first shot while struggling for control of the pistol and the second while making his escape, in his police report however, the arresting officer had claimed that the accused had taken control of the pistol and then fired the two shots while making his getaway. The third version was the sworn evidence of the accused, which according to the accused ought to be the version accepted by the court because it supported the reason for the seizure of the pistol.

Held, acquitting and discharging the accused of the charge:

(1) The burden is on the prosecution throughout the trial to prove beyond reasonable doubt the essential ingredient of s 3 of the Act, ie that the accused had discharged the firearm with the intention to cause death or hurt. However an evaluation of the totality of the evidence showed a discrepancy appearing in the oral testimony of the arresting officer and his police report as to when the two shots were discharged from the pistol. Although this discrepancy did not appear to materially affect the foundation of the prosecution's case, the evidence of the arresting officer would need to be scrutinised and evaluated against the sworn testimony of the accused. Upon reassessing the evidence at this stage, it became clear that there was a doubt as to whether the arresting officer had discharged the two shots while the pistol was in his possession. As such there was a failure to prove an essential ingredient of the charge resulting in the dismissal of the charge against the accused (see paras 39–41 & 43).

(2) In any case, the accused had to merely cast a reasonable doubt on the prosecution's case to earn an acquittal, which he had done (see para 44).

[Bahasa Malaysia summary

Apabila tertuduh, Kandiah a/l Subramaniam, diberkas oleh polis dia dikatakan telah melawan tangkapan seorang pegawai polis, Khairul Anuar b Sarbini ('pegawai yang menangkap'). Kemudiannya, sewaktu melawan tertuduh telah mendapat pistol polis yang menangkap tersebut ('pistol') dan melepaskan dua tembakan. Selepas itu tertuduh melarikan diri dari tempat kejadian jenayah tetapi menyerah diri kepada polis enam hari kemudiannya.

Selepas penahanannya tertuduh telah bekerjasama dengan polis dan membantu mereka mendapatkan kembali pistol dari belukar di mana dia telah membuangnya sewaktu dia melarikan diri. Tertuduh dituduh untuk kesalahan di bawah s 3 Akta Senjata Api (Penalti Berlesen) 1971. Pihak pendakwaan dalam menyokong tuduhan tersebut memanggil lapan orang saksi untuk memberi keterangan. Pada penutup kes pendakwaan tertuduh menghujah bahawa pihak pendakwaan telah gagal untuk membuktikan kes prima facie, antara lain, terdapat percanggahan dalam keterangan lisan pegawai yang menangkap dan laporan polisnya, tiada cap jari pada pistol, bilangan polis yang terlibat dalam serbuan tidak konsisten semasa tertuduh ditahan, dan polis gagal untuk menyatakan pistol tersebut disimpan dengan selamat dari masa penemuannya. Tanpa mempedulikan hujahan-hujahan tersebut, hakim perbicaraan berpuas hati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh. Apabila tertuduh dipanggil untuk membuat pembelaan, dia memilih untuk memberi keterangan bersumpah. Menurut tertuduh, pada hari tersebut dia telah menyewakan lorinya kepada pelanggan yang mahu berpindah pejabat. Selepas lori tersebut dimuatkan dengan komputer-komputer dan barang-barang lain, tertuduh diarahkan untuk memandu. Sewaktu lori tersebut bergerak tertuduh nampak polis menaiki dua motorsikal menghampiri lori tersebut dan hanya pada masa itu tertuduh mengesyaki terdapat sesuatu yang tidak kena. Walau bagaimanapun, dia memandu lori tersebut dan dikejar pegawai yang menangkap sehingga ke jalan mati. Tertuduh kemudiannya turun daripada lori dan nampak pegawai yang menangkap mengacukan pistol ke arahnya. Menurut tertuduh dia bergelut dengan pegawai yang menangkap untuk mendapatkan pistol tersebut kerana dia takut dia akan ditembak dan semasa pergelutan itu terjadi, tembakan dilepaskan dua kali daripada pistol yang masih dalam milikan pegawai yang menangkap. Secara intipati, pembelaan tertuduh ialah bahawa dua tembakan tersebut dibuat oleh pegawai yang menangkap dan alasan di sebalik rampasan pistol tersebut ialah untuk menyelamatkan dirinya sendiri. Pihak pembelaan menghujah bahawa selepas menilai keterangan yang dikemukakan secara keseluruhan terdapat tiga versi bagaimana dua tembakan itu dilepaskan. Pegawai yang menangkap memberi keterangan secara lisan bahawa tertuduh telah melepaskan tembakan pertama sewaktu bergelut untuk mendapatkan pistol tersebut dan kedua semasa melarikan diri, walau bagaimanapun, dalam laporan polisnya, pegawai yang menangkap mendakwa bahawa tertuduh telah mengambil pistol tersebut dan melepaskan dua kali tembakan sewaktu melarikan diri. Versi ketiga merupakan keterangan bersumpah tertuduh, yang mana menurut tertuduh, merupakan versi yang perlu diterima oleh mahkamah kerana ia menyokong alasan untuk merampas pistol tersebut.

Diputuskan, membebaskan dan melepaskan tertuduh daripada tuduhan:

(1) Beban adalah ke atas pihak pendakwaan di sepanjang perbicaraan

untuk membuktikan, melampaui keraguan munasabah, unsur penting s 3 Akta, iaitu bahawa tertuduh telah melepaskan tembakan dengan tujuan untuk menyebabkan kematian atau kecederaan. Walau bagaimanapun, penilaian keseluruhan keterangan menunjukkan timbulnya percanggahan dalam keterangan lisan pegawai yang menangkap dan laporan polisnya merujuk kepada dua tembakan yang dilepaskan daripada pistol tersebut. Walaupun percanggahan ini bukan secara material menjejaskan asas kes pihak pendakwaan, keterangan pegawai yang menangkap perlu dikaji dan dinilai terhadap keterangan bersumpah tertuduh. Dengan menilai keterangan pada peringkat ini, jelas bahawa terdapat keraguan sama ada pegawai yang menangkap telah melepaskan dua tembakan sewaktu pistol tersebut masih dalam milikannya. Oleh itu terdapat kegagalan untuk membuktikan unsur utama tuduhan yang menyebabkan penolakan tuduhan terhadap tertuduh (lihat perenggan 39–41 & 43).

(2) Walau bagaimanapun, tertuduh perlu menimbulkan keraguan yang munasabah ke atas kes pihak pendakwaan untuk dibebaskan, yang mana telah dilakukannya (lihat perenggan 44).]

Notes

For cases on whether accused had discharged firearm with intention to cause death or hurt, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 678–684.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (folld)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)
Mohamed Alias v PP [1983] 2 MLJ 172, HC (refd)
PP v Rajan Sinniah [2007] 8 CLJ 674, HC (refd)
Sheffield City Counsel v Graingers Wines Ltd [1978] 2 All ER 70, CA (refd)
Sun Kam Heng v PP [1992] 2 MLJ 826, SC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 113
Firearms (Licensed Penalties) Act 1971 s 3

Wan Shaharuddin (Azmeer with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Baljit Singh (Shukor Baljit & Partners) for the accused.

Syed Ahmad Helmy J:

[1] The accused is charged for an offence under s 3 of the Firearms (Licensed Penalties) Act 1971 ('the Act') and the charge reads as follows:

Bahawa kamu, pada 3 Mei 2006, jam lebih kurang 6.09 pagi, di bawah jambatan Taman Kinrara, berhampiran stesen minyak Esso, Batu 71/2, Jalan Klang Lama, Puchong, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, semasa kamu cuba melawan untuk melepaskan diri dari tangkapan yang sah oleh seorang anggota polis iaitu penjawat awam bernama Khairul Anuar b Sarbini (KPT: RF 142493), kamu telah merampas sepucuk pistol jenis Revolver 38 Smith & Wesson, ukuran 2 inci, no siri J789491, dan telah melepaskan dua das tembakan daripada pistol tersebut dengan niat hendak menyebabkan kematian atau kecederaan terhadap anggota polis tersebut dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 3 Akta Senjatapi (Penalti Lebih Berat) 1971.

[2] The requisite ingredients that has to be established by the prosecution in a charge under s 3 of the Act is two fold, namely:

(a) that the accused committed a scheduled offence, in resisting arrest by a police officer;

(b) that at the time of committing the scheduled offence, the accused discharged a firearm with the intention to cause death or hurt to the victim notwithstanding that no hurt is caused thereby.

[3] As was established by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 the standard of proof on the prosecution at the close of its case is to make out a prima facie case. A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer. Hence a prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side.

[4] The court in determining whether the prosecution has made out a prima facie case must subject the prosecution's evidence to maximum evaluation.

[5] The prosecution in support of the charge called eight witnesses and hence it behoves on this court to subject the evidence adduced to maximum evaluation in determining whether a prima facie case has been made out or not.

[6] Learned counsel for the accused Mr Baljit Singh advanced five grounds in his submission that the prosecution has failed to make out a prima facie case.

[7] There was tampering of the Arms Register Book which was marked as exh D12 where liquid paper was applied in the Arm No column and the Arm

No J789491 was written over it which gives rise to material defects and a doubt has arisen as to the identity of the revolver used in this case and relies on the Supreme Court decision in *Sun Kam Heng v Public Prosecutor* [1992] 2 MLJ 826.

[8] From the evidence adduced and in particular to the testimony of SP4 Constable Nor Azhar bin Abdul Wahab the storekeeper of the Armoury at Balai Polis Puchong the revolver.38 with the serial No J789491 was handed to L/Kpl Khairul Annuar bin Sarbini (SP5) together with 30 bullets on 3 May 2006 at 4 in the morning.

[9] In cross-examination he admitted that he was the one who applied the liquid paper in the Arm No column to erase the serial number originally inserted and writing the serial No J789491 over the erasure. He explained why he did so in that the serial number originally inserted was for another police personnel but because SP5 came earlier he made the amendments as such.

[10] In approaching the issue raised the determination of same cannot be arrived at by looking at SP4's testimony in isolation but rather in totality together with the evidence of the other witnesses of the prosecution.

[11] I have scrutinised the evidence of SP4 and though the witness is rather slow in answering questions raised in cross-examination nevertheless upon evaluating his evidence in totality together with the evidence of SP5 I cannot reject his explanation as to the erasure made by way of liquid paper and it is my finding that the revolver .38 was the revolver handed over by him to SP5. My finding is predicated by the fact that the signature of SP5 as the recipient is in column 9 of D12 and there was no challenge whatsoever in the cross-examination of SP5 that he was not the person who received the .38 revolver from SP4 and that the revolver was in the possession of SP5 when he was on his rounds on 3 May 2006.

[12] The numbering in numerical sequence as appears in column 1 of the Arms Register (D12) further supports my finding.

[13] The second issue raised by learned defence counsel was the discrepancy in the oral testimony of SP5 and his police report in P16 as to when the two shots were discharged which the defence contends amounted to serious discrepancy. The discrepancy highlighted by defence counsel was that in his testimony in court SP5 testified that the first shot was discharged during the struggle between SP5 and the accused and the second shot when SP5 chased the accused whereas in P16 SP5 stated that two shots were discharged by the accused when SP5 was chasing the accused and in support

thereof advanced the cases of *Public Prosecutor v Rajan Sinniah* [2007] 8 CLJ 674 and *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209.

[14] Upon evaluating SPS's testimony in court and the police report P16 made by him it cannot be disputed that two shots were discharged from the revolver P5 bearing registration No J789491 by the accused who successfully seized the pistol in the struggle with SP5. The discrepancy as to his oral testimony during the struggle and the second when he was chasing the accused does not at this stage materially affect the core of the prosecution's case that two shots were discharged from the revolver P5 which was issued to SP5 as corroborated by the testimony of SP5, SP7 and SP2. Further the accused in his cautioned statement which was admitted as exh D19 did not dispute the successful seizure of P5 by the accused in the struggle with SP5 and more importantly the explanation by SP5 as to the discrepancy in that he was traumatised by the incident and was in that state when he made the police report P16 some 3 1/2 hours after the incident.

[15] In my audio-visual advantage of the evidence given by SP5 I have no reason to reject his testimony as incredible and I accordingly accept his testimony and ruled that the discrepancy herein is not material as to affect the foundation of the prosecution's case.

[16] In short the materiality of the discrepancy has been negative upon an overall evaluation of the testimony of the prosecution's witness.

[17] Issue of fingerprints. The issue of the absence of fingerprints per se does not to my mind negative the prosecution's case as the evidence as to the nexus of P5 and the accused has to be viewed in totality together with the testimony of the prosecution's other witness.

[18] Issue of inconsistency in the evidence of SP2, SP5, SP6 and SP7 and the incomplete investigation.

[19] The inconsistency focussed upon by learned counsel for the defence was the number of police personnel involved in the raid where SP2 in his evidence testified that four personnel was at the place of incident whereas the photographs taken by SP3 showed about eight to ten police personnel. Again defence counsel raised the manner in which the exhibits were kept which gave rise to the chain of evidence being broken in respect of the safe keeping of the exhibits.

[20] Discrepancy to my mind does exist — it cannot be denied that witnesses will invariably have various and somewhat different powers of perception but so long as it is not material the discrepancies are acceptable.

A It is trite that the fact that there are discrepancies in a witness' testimony does not straightaway make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness' evidence if it considers them to be true. In considering the B discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and his demeanour — *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172.

C **[21]** In the case at hand defence counsel's challenge is pivoted on the failure of SP7 to satisfactorily account for the safekeeping of the revolver P5 from the time SP2 handed P5 to him on 9 May 2006 until 11 May 2006 when he handed P5 to ASP Izanizam for finger printing. SP7 in his examination-in-chief stated that at 1pm on 9 May 2006 SP2 handed to him D P5, two live bullets and two bullet casings. SP7's testimony as regards the handing over of P5 to him by SP2 was reaffirmed by him in cross-examination and the serial number of J789491 of P5 was also to be found in the chamber. In re-examination SP7 reiterated that P5 was the same revolver that he received from SP2.

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[22] In the light of the sequence of the testimony of SP7 in examination-in-chief, cross-examination and re-examination the discernible feature is that the identity of P5 remains unchallenged. Since the identity of the revolver remains unchallenged in that P5 was the same revolver which was F produced in court and the evidence of the chemist that it was SP7 who handed him the revolver P5 on 23 June 2006 for ballistic test, I am satisfied that there is no gap in the core of the prosecution's case as regards P5 as strenuously urged by learned defence counsel.

G **[23]** Issue of non-compliance with s 51A of the Criminal Procedure Code. On the issue of the prosecution's failure to abide to the provisions of s 51A of the Criminal Procedure Code in failing to deliver copies of the police reports marked P17 and P18 dated 3 May 2006 and 9 May 2006 respectively H before the trial it is learned defence counsel's submission that the non-compliance is fatal and renders P17 and P18 inadmissible.

[24] Section 51A is a new provision which was introduced through Amendment Act A1274/06 incorporating the mechanism of pre-trial I discovery in the administration of criminal justice.

[25] The section reads as follows:

51A

(1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:

(a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;

(b) a copy of any document which would be tendered as part of the evidence for the prosecution; and

(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

[26] Though the wording of the section is predicated by the word 'shall' nevertheless to my mind of particular importance is the question of relevancy and prejudicial effect of P17 and P18. It is also prudent to be minded of the salutary advice of Lord Denning MR in *Sheffield City Counsel v Graingers Wines Ltd* [1978] 2 All ER 70 at p 72 to the effect that '*it is always a matter of impression*' in determining whether the word 'shall' is to be treated as mandatory or directory.

[27] On the question of relevancy and prejudicial effect of P17 and P18, I am of the considered view that the report in P17 which relates to the finding of the lorry driven by the accused is for the purpose of completing the sequence of events involving the accused whereas P18 was relevant for the purpose of supporting the accused, act of surrendering to the police.

[28] Based on the reasoning aforesaid I am satisfied that the prosecution has proven a prima facie case on the charge preferred against the accused and he is accordingly called upon to enter his defence.

[29] Upon the defence being called the accused elected to give evidence on oath. According to the accused on 3 May 2006 he received a call to rent his lorry for purpose of moving office in Puchong. Upon arrival three men began loading goods and computers into his lorry.

[30] Upon the goods being placed on to the lorry the three men got into the lorry and whilst the lorry was about to move the three men saw three uniformed policeman on two motorcycles approaching them. The three men got out of the lorry and asked the accused to drive the lorry away. Suspecting that there was something wrong with the goods that were loaded he quickly drove the lorry with the policeman later identified as SP5 in hot pursuit until he came to a dead end. He alighted from the lorry and saw SP5 in front of the lorry pointing a pistol at him whereupon he raised both his hands and submitted to the custody of the policeman. He knelt on both knees and raised and placed both hands behind his neck. SP5 kept pointing the pistol at him and uttered the words '*saya akan tembak awak nanti*' four or five times.

[31] According to the accused he feared that he would be shot when hearing the utterances aforesaid. The policeman asked him where his other friends were and hit and kicked him on the face twice whilst continuing to point the pistol at him. When SP5 sought to kick him the third time the accused managed to grab his right leg and SP5 fell backwards whereupon he heard a shot being discharged from the pistol which was in the possession of SP5. The accused then jumped on to SP5's body and in the ensuing struggle whilst the pistol was still in the possession of SP5 another shot was discharged from the pistol. The accused held both the wrist of SP5 in the struggle and in the light of the two shots discharged from the pistol and fearing for his life he managed to seize the pistol from SP5. According to the accused he seized the pistol to save himself and began running away together with the pistol. Whilst running away he heard SP5 shouting for the return of the pistol. When he was a safe distance away from SP5 he threw the pistol in the bushes. Six days later he surrendered himself to the police at Balai Polis Puchong after having read from the Tamil Malaysia Namban that he ran away with the pistol. He gave a statement to the police which was tendered as defence exh D19. He gave his cooperation to the police and assisted the police to recover the pistol from the bushes which was the spot where he threw the pistol in making his getaway. He had no intention of causing hurt to SP5 and his sole objective of running away after seizing the pistol from SP5 was because he feared for his life. The two shots discharged from the pistol was made by SP5 and he threw it in the bushes after he felt safe to do so.

[32] The core of the accused's defence was that the discharge of the two shots from the pistol was made by SP5 and not him and the reason behind his seizure of the pistol was to save himself from being shot. It is the defence contention that upon evaluating the totality of the evidence adduced there are three versions on how the two shots were discharged.

[33] The first version relates to the testimony of SP5 at p 27 of the notes of evidence where he stated that the accused discharged the first shot when

he was lying on his back on the ground and the second shot discharged by the accused was when he was about ten meters from the accused who refused to comply with his request to return the pistol to him.

[34] The second version relates to the police report of SP5 which was marked as exh P6 where SP5 testified that after the struggle whereupon the accused managed to seize the pistol from him and upon his pursuit of the accused, two shots were fired at him by the accused.

[35] The third version was the accused's version that the first shot was fired by SP5 when the accused managed to hold on SP5's right leg and he fell backwards on to the ground and the second shot wars fired again by SP5 during the struggle.

[36] It is trite that when a fact situation gives rise the three different versions the version most favourable to the accused has to be adopted.

[37] Now at the defence stage upon the sworn testimony by the accused it behoves the court to conduct a maximum evaluation and re-evaluation of all the evidence as adduced through the prosecution's witness and the accused. Whatever suggestion made by the defence to the prosecution witness has now crystallised as evidence through the sworn testimony of the accused.

[38] On this score learned defence counsel strenuously urged that the version of the accused should be accepted that all along the two shots discharged from the pistol was made by SP5 and the reason behind his seizure of the pistol during the struggle was to save himself from being shot. The reason aforesaid was amply supported by the conduct of the accused in throwing the pistol seized in the bushes after he felt that SP5 did not pursue him any more.

[39] The essential ingredient of s 3 of the Act is that the discharge of the firearm was made by the accused with the intention to cause death or hurt.

[40] The burden is on the prosecution throughout the trial to prove beyond reasonable doubt that it was the accused that discharged the firearm with the intention to cause death or hurt. The failure to prove this essential ingredient would invariably result in the dismissal of the charge against the accused.

A **[41]** Upon an evaluation of the totality of the evidence before me it is incumbent upon me to revisit the discrepancy appearing in the testimony of SPS and his police report in P16 as to the manner the two shots were discharged and the statement made by the accused under s 113 of the Criminal Procedure Code in D19 as it would have a determinative effect as B to whether it was the accused who discharged the two shots.

[42] Now at the stage of the prosecution's case based on the denials by SP5 as to the suggestion made by defence counsel that SP5 fell backwards to the ground upon the accused pushing his right leg and the shot being fired by C SP5, I had accepted the oral evidence of SP5 which was supported by his police report in P16 wherein it was stated that two shots were fired by the accused. However in the light of the sworn testimony of the accused the suggestion made has concretised into evidence and involves a revisiting of my earlier conclusion. The sworn testimony of the accused is now evidence that D has to be scrutinised and evaluated against the evidence of SP5 and also his credibility as to who discharged the two shots. Upon reassessing the evidence I cannot dismiss the accused's version that it was SP5 who discharged the two shots.

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[43] At the stage of the prosecution's case though there was a discrepancy between the testimony of SP5 in court and his police report in P16 as regards when the two shots were discharged from the pistol. I nevertheless ruled that it does not affect the core of the prosecution's case because of the common F denominator of two shots being fired appearing in his oral testimony and police report in SP16. Now in the light of the sworn evidence of the accused that it was SP5 who discharged the two shots from the pistol a doubt is created in my mind as to the culpability of the accused and hence leads me to conclude that the possibility of SP5 discharging the two shots cannot be G discounted.

[44] It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence for which he H is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal his duty is merely to cast a reasonable doubt on the prosecution's case — see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073.

I

[45] Having discharged the burden of casting a reasonable doubt the accused is accordingly acquitted and discharged from the charge herein.

Accused acquitted and discharged.

Reported by Kohila Nesan